IBRAHIM DAHABAN & ORS

v.

MOHD DAUD MOHD YUSOF & ANOR

HIGH COURT MALAYA, MELAKA
KN SEGARA J
[CIVIL APPEAL NO: 12-29 OF 1999]
20 JANUARY 2000

CIVIL PROCEDURE: *Time - Extension of time - Application for extension of time to file record of appeal - Solicitor's mistake - Whether a ground for court to grant extension of time - Whether there was full and frank disclosure in affidavit in support of application - Whether court could exercise discretion to grant extension of time*

The appellants applied for an extension of time to file the record of appeal in respect of a running-down action, heard and disposed off in the Sessions Court. The record of appeal had been filed seven days out of time. The only reason given in the affidavit in support of the instant application for the said delay was that the sealed order of the Sessions Court had yet to be received. However, the deponent of the affidavit who appeared as counsel admitted from the Bar that she had made a mistake in the computation of the date. She also submitted that the draft order was only sent to the respondents' solicitors for approval on 3 December 1999, *ie*, the very date the record of appeal was filed out of time in the High Court. These facts were, however, not disclosed in the said affidavit.

Held:

[1] In view of the fact, that the decision of the Sessions judge was given on 10 September 1999 and the notice of appeal dated 10 September 1999 was filed on 17 September 1999, it was sheer callous indifference on the part of the appellants' solicitors to forward the draft order for approval to the respondents' solicitors on 3 December 1999. The only obvious reason given for the delay in filing the record of appeal out of time was the mistake of the appellants' solicitors in the computation of time.

[2] The granting or dismissal of an application for extension of time is very much a discretionary matter. Full and frank disclosure must be made in the affidavit in support. This was not so in this case. Nevertheless, counsel should be commended for being brave, honest and responsible in admitting her mistake from the Bar. However, a solicitor's mistake and omission to be vigilant cannot be accepted as an explanation and ground to grant

an extension of time. The principle to be gleaned from several Federal Court decisions is that the mistake of a solicitor or the solicitor's clerk is not a sufficient ground to grant an extension of time.

[3] Rules of court must *prima facie* be obeyed. There was no material placed before the court which justified the exercise of the court's discretion in favour of the appellants to grant an extension of time to file the record of appeal.

[Application dismissed.]

Cases referred to:
Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn Bhd [1976] 2 MLJ 236 ***(refd)***
Gan Hay Chong v. Siow Kian Yuh & Anor [1975] 2 MLJ 129 ***(refd)***
Ratnam v. Cumarasamy & Anor [1965] 31 MLJ 228 ***(refd)***
Sri Jaya Transport Co Ltd v. Fernandez [1970] 1 MLJ 87 ***(refd)***
Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor [1984] 1 MLJ 118 ***(refd)***

Legislation referred to:
Subordinate Courts Rules 1980, O. 49 r. 3A(3)

For the appellants - Preetha Nayar; M/s PS Sohanpal & Sidhu
For the respondents - Kesavan; M/s Kesavan & Assocs

Reported by Usha Thiagarajah

JUDGMENT

KN Segara J:

By notice of motion dated 1 December 1999 (encl. 10), the solicitors for the appellants herein applied for an extension of time to file the record of appeal in respect of a running-down action, wherein the appellants were the plaintiffs, heard and disposed off in the Sessions Court, Melaka. The application was supported by the affidavit of Preetha Nayar (encl. 11).

The record of appeal was filed in the High Court, Melaka on 3 December 1999, when it ought to have in fact been filed on or before 26 November 1999, in compliance with O. 49 r. 3A(3) Subordinate Courts Rules 1980. The record of appeal was, therefore, filed seven days out of time. The only reason proferred in the affidavit of Preetha Nayar for the said delay, in para. 11 of the affidavit, was that the sealed order of the Sessions Court had yet to be received. However, the deponent of the affidavit, who appeared as counsel before me in this application, frankly and honestly admitted from the Bar that she had made a mistake in the computation of the date. She also frankly

admitted that the draft order was only sent to the solicitors for the defendants for approval on 3 December 1999, that is, on the very date the record of appeal was filed out of time in the High Court. These facts were, however, not disclosed in the affidavit. In view of the fact that the decision of the learned Sessions Court Judge was given on 10 September 1999 and the notice of appeal dated 10 September 1999 was filed on 17 September 1999, it is sheer callous indifference (to put it rather mildly) on the part of the solicitors for the appellants to forward the draft order for approval to the solicitors for the defendants on 3 December 1999. The only obvious reason for the delay in filing the record of appeal out of time is the mistake of the solicitors for the plaintiffs/appellants in the computation of time.

The granting or dismissal of an application for extension of time is very much a discretionary matter. Full and frank disclosure must be made in the affidavit in support. This was not so in this case. Nevertheless, counsel should be commended for being brave, honest and responsible in admitting her mistake from the Bar. However, a solicitor's mistake and omission to be vigilant cannot be accepted as an explanation and ground to grant an extension of time. The principles to be gleaned from several of the Federal Court decisions is that the mistake of a solicitor or the solicitor's clerk is not sufficient ground to grant an extension of time. See:

1. *Tractors Malaysia Bhd v. Southern Estates Sdn Bhd & Anor* [1984] 1 MLJ 118.
2. *Sri Jaya Transport Co Ltd v. Fernandez* [1970] 1 MLJ 87.
3. *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129.
4. *Hoe Joo Sawmills v. Sigma (Air Conditioning) Sdn Bhd* [1976] 2 MLJ 236.

It is trite law that Rules of Court must *prima facie* be obeyed. The Privy Council, as far back as in 1965, in the case of *Ratnam v. Cumarasamy & Anor* [1965] 31 MLJ 228 at 229 said:

> The Rules of Court must *prima facie* be obeyed, and in order to justify a court in extending the time during which some step in procedure requires to be taken there must be some material upon which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation.

There is no material placed before me which justifies the exercise of my discretion in favour of the appellants to grant an extension of time to file the record of appeal.

Application dismissed. Order accordingly.